

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)

Amendment of Section 73.202(b))

Table of Allotments,)

FM Broadcast Stations.)

(Islamorada, Marathon and Sugarloaf Key,)
Florida))

MB Docket No. 05-107
RM-11199

NOTICE OF PROPOSED RULEMAKING

Adopted: March 16, 2005

Released: March 18, 2005

Comment Date: May 9, 2005

Reply Comment Date: May 24, 2005

By the Assistant Chief, Audio Division, Media Bureau

1. The Audio Division has before a Petition for Rule Making filed by LSM Radio Partners LLC ("Petitioner"), licensee of Station WWWW(FM), Channel 288C2, Marathon, Florida, proposing the allotment of Channel 289A to Sugarloaf Key, Florida, as its first local service. To accommodate this allotment, Petitioner also requests the reallocation of Channel 288C2 from Marathon to Islamorada, Florida, as its second local service and modification of the Station WWWW license accordingly. Petitioner stated its intentions to apply for the requested channels at Sugarloaf Key and Islamorada, if allotted.

2. Petitioner proposes the allotment of Channel 289A at Sugarloaf Key, Florida, as its first local service. In support of community status, Petitioner states that Sugarloaf Key has a population of 1,528 persons. Sugarloaf Key has its own zip code, public school, "Sugarloaf Elementary/Middle School", volunteer fire department and airport. Sugarloaf Baptist church is located in Sugarloaf Key. There are numerous restaurant and companies located in Sugarloaf Key, including Bay Point Gourmet Pizza, Mangrove Mama's, Old Tyme Keys Atmosphere, Crystal Seas Kayaking, Fantasy Dan's Airplane Rides, Tommy's Tire & Auto Services. Sugarloaf Key also has its own bank branch called First State Bank of the Florida Keys. Sugarloaf Key has several restaurants and businesses that identify themselves with Sugarloaf Key, such as Sugarloaf Lodge Restaurant, Sugarloaf Sports & Leisure Club, Sugarloaf Resort-KOA and Sugarloaf Marina. Based on the foregoing, we tentatively conclude that Sugarloaf Key is a community for allotment purposes.

3. To accommodate the proposed Sugarloaf Key allotment, Petitioner also requests the reallocation of Channel 288C2 from Marathon to Islamorada, as its second local service and modification of the Station WWWW(FM) license accordingly. Petitioner filed its reallocation request pursuant to Section 1.420(i) of the Commission's rules, which permits the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest in the proposed allotment.¹ The proposed reallocation of Channel

¹ See *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), recon. granted in part 5 FCC Rcd 7394 (1990).

288C2 at Islamorada is mutually exclusive with the current authorized facilities of Station WWWK(FM), Channel 288C2, Marathon, Florida. When considering a reallocation proposal, a comparison is made between the existing allotment and the proposed allotment to determine whether the reallocation would result in a preferential arrangement of allotments based upon the FM Allotment priorities.² The proposed Channel 288C2 reallocation at Islamorada would provide a second local service,³ whereas the retention of Station WWWK(FM) at Marathon would attribute to a fourth local service.⁴ As such, the reallocation proposal results in a preferential arrangement of allotments based on priority (4), other public interest matters. Petitioner states that its proposal is in the public interest because it could provide Sugarloaf Key with its first local service and Islamorada with its second local service. Moreover, Petitioner states that the proposed Islamorada reallocation would produce a net gain of 79,598 persons, noting that the loss area is considered well-served because it would continue to receive a minimum of six FM services. The proposed Islamorada reallocation would not cover any part of an Urbanized Area. Therefore, Petitioner is not required to submit a *Tuck* showing.⁵

4. The proposal warrants consideration because it could provide Sugarloaf Key with a first local service and Islamorada with a second local service. A staff engineering analysis has determined that Channel 289A can be allotted to Sugarloaf Key in conformity with the Commission's rules, provided there is a site restriction of 3.6 kilometers (2.2 miles) southwest at coordinates 24-37-30 NL and 81-32-30 WL. Channel 288C2 can be reallocated to Islamorada, consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's rules, provided there is a site restriction of 15.5 kilometers (9.6 miles) northeast at coordinates 25-01-23 NL and 80-30-06 WL. In accordance with the provisions of Section 1.420(i) of the Commission's rules, we shall not accept competing expressions of interest pertaining to the use of Channel 288C2 at Islamorada.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

<u>Channel Number</u>		
<u>Community</u>	<u>Present</u>	<u>Proposed</u>
Islamorada, Florida	283C2	283C2, 288C2
Marathon, Florida	232C2, 249A, 288C2	232C2, 249A
Sugarloaf Key, Florida	-----	289A

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required in paragraph 2 of the Appendix before a channel will be allotted.

² The FM Allotment priorities are (1) First full-time aural service. (2) Second full-time aural service. (3) First local service. (4) Other public interest matters. [Co-equal weight is given to priorities (2) and (3)], *See Revision of FM Assignment Policies and Procedures*, 90 FCC Rcd 88, 91 (1988).

³ Channel 283C2 was recently allotted to Islamorada. *See Islamorada, Florida*, 19 FCC Rcd 22647 (2004).

⁴ AM Station WFFG and FM Stations WGMX and WAVK are currently licensed to Marathon.

⁵ *See Faye and Richard Tuck*, 3 FCC Rcd 5374 (1998) ("*Tuck*") and *RKO General*, 5 FCC Rcd 3222 (1990) ("*KFRC*").

8. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before May 9, 2005, and reply comments on or before May 24, 2005, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, SW, TW-A325, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

David G. O'Neil, Esq.
Counsel, LSM Radio Partners LLC
Rini Coran, PC
1501 M Street, N.W.
Suite 1150
Washington, D.C. 20005

9. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail or Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. **All filings must be addressed to Marlene H. Dortch, Secretary, Federal Communications Commission, Office of the Secretary. Any filing that is not addressed to the Office of the Secretary will be treated as filed on the day it is received in the Office of the Secretary. See 47 C.F.R. § 1.7. Accordingly, failure to follow the specified requirements may result in the treatment of a filing as untimely.**

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to a rule making proceeding to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules.⁶ This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, therefore, it does not contain any proposed information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

11. For further information concerning a proceeding listed above, contact Rolanda F. Smith, Media Bureau (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision in the applicable docket is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or any summary of any new information shall be served by the person making the presentation upon the other parties to the proceeding in particular docket unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed

⁶ See Certification that Section 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules. 46 FR 11549 (February 9, 1981).

the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
Audio Division
Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority found in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b), and 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, IT IS PROPOSED TO AMEND the FM Table of Allotments, 47 C.F.R. Section 73.202(b), as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See 47 C.F.R. Section 1.420(d).)

(b) With respect to petitions for rule making which conflict with the proposals in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in 47 C. F.R. Sections 1.415 and 1.420, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See 47 C.F.R. Section 1.420(a), (b) and (c).) Comments should be filed with the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., TW-A325, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of 47 C.F.R. Section 1.420, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center (Room CY-A257) at its headquarters, 445 12th Street, S.W., Washington, D.C.